FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-81

In The
Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

VICTOR E. DEMARCO
MICHAEL A. NIMS

Jones, Day, Reavis & Pogue
1700 Union Commerce Building
Cleveland, Ohio 44114
(216) 696-3939

Counsel for Respondent

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE TERMS OF THE SUB PLAN HAVE BEEN CORRECTLY APPLIED IN THIS MATTER	3
THE PROVISIONS OF THE SUB PLAN ARE NOT IN VIOLATION OF 38 U.S.C. 2021	4
THE ARGUMENTS ADVANCED BY PETITIONER DO NOT REQUIRE A DIFFERENT RESULT	8
CONCLUSION	12

TABLE OF CASES AND AUTHORITIES

Cases — PAGE

Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966) .. 9, 10

Akers v. General Motors Corp., 501 F.2d 1042 (7th Cir. 1974) 10

Alabama Power Co. v. Davis, 431 U.S. 581 (1977) 3, 4, 7, 8, 9, 11

Bradley v. General Motors Corporation, 283 F.Supp. 481 (E.D. Mo. 1968) 11

Foster v. Dravo Corp., 420 U.S. 92 (1975) 3, 4, 6, 7, 9, 11

Gentile v. U.S. Trucking Corporation, 355 F.Supp. 960 (S.D.N.Y. 1973), *aff'd* 489 F.2d 752 (2d Cir. 1974) .. 11

Hoffman v. Bethlehem Steel Corp., 477 F.2d 860 (3d Cir. 1973) 8, 9, 10

Kasmeier v. Chicago, Rock Island and Pacific R. Co., 437 F.2d 151 (10th Cir. 1971) 11

Statutes and Rules

38 U.S.C. 2021 ..... 3, 4, 8

In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-81

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent Republic Steel Corporation would supplement the Statement contained in Petitioner's Brief in the following respects. The Supplemental Unemployment Benefit Plan ("SUB Plan") involved in this matter provides the method by which the dollar amount of each credit unit is calculated. Generally that method is set out in Section 1 of the Plan (A., 17-19). The factors which determine the dollar value of the benefit which any particular employee might receive include the wage rate of the employee, the number of his or her dependents, the amount of state unemployment compensation paid to the employee, and the amount of money remaining in the Plan.

In addition, the record below includes certain testimonial evidence beyond the basic stipulation of facts. Testimony was offered by a representative of the joint

industry benefits committee and by a representative of the outside firm which provides consulting services to the United Steelworkers of America respecting benefit plans. In general this testimony describes the reasoning behind the formulas utilized in the SUB Plan and the purposes for such Plan. Such purposes were described as an attempt to provide SUB payments in areas in which wages or wage substitutions had traditionally been paid within the steel industry. (Tr., 33, 40-44, 55-56). The record contains no testimony to the contrary and indeed, petitioner called no witnesses at the hearing.

SUMMARY OF ARGUMENT

The salient features of the SUB Plan at issue in this case are as follows. Credit units are earned generally only through work. An employee receives one-half credit unit for each week in which he works. This is true irrespective of the seniority of the employee. The work formula is tied to the undisputed fact that employees in the steel industry generally work at least 32 hours in any week in which they work at all. This is because of the contractual agreements within the industry which require payment of benefits if any employee is required to work less than 32 hours in a week. The evidence in the record on this issue is undisputed.

The maximum number of credit units which can be accumulated through work by any employee is 52. This is true irrespective of the seniority of any employee.

The dollar value of a credit unit which any employee may have accumulated is not a factor of seniority. Rather, such dollar value is determined by the wage rate of the employee which in turn is dependent upon the job classification which he holds, by the number of dependents which the employee has, by the amount of state unemployment compensation which the employee receives, and by the amount of funding remaining in the Plan. Thus it is quite

possible that the dollar value of a credit unit will be higher for a less senior employee than for a more senior employee.

Indeed, the relationship between the SUB Plan and seniority is essentially a negative one. The purpose of the Plan is to provide temporary wage supplementation in the event of layoff. Generally, layoff impacts on less senior employees who are thus more likely to utilize the benefit. Moreover, since the amount of funding remaining in the Plan can affect the dollar value of a credit unit, it is quite possible that the dollar value will be lessened as more senior employees are laid off since the amount of money in the Plan will have lessened due to previous payments to less senior employees.

Given these attributes, the SUB Plan at issue here should be enforced precisely as it was written following extensive collective bargaining. Nothing in 38 U.S.C. 2021 requires otherwise. Under the principles articulated most recently by this Court in the cases of *Foster v. Dravo Corp.*, 420 U. S. 92 (1975) and *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977), the Plan is entirely consistent with the law. The benefit at issue is conditioned upon an undisputed bona fide work requirement and the nature of the benefit is temporary wage supplementation as earned through actual work. The decisions of the lower courts in this matter should be affirmed.

ARGUMENT

THE TERMS OF THE SUB PLAN HAVE BEEN CORRECTLY APPLIED IN THIS MATTER

It is clear in this matter that the SUB Plan has been correctly applied according to its express terms. The Plan provides that a returning veteran be given continuous service credit for the time he spent in the military. The Plan also provides that no credit units are accumulated by such veteran during the time which he is not in the employ of Republic Steel.

The basic provisions of the Plan relevant to the above are these. An employee is eligible to receive benefits only if he has two years of continuous service. A returning veteran is given continuous service credit for his time in the military and thus his basic eligibility to receive benefits is not impacted by this time away from the employ of Republic.

The number of credit units accumulated by an employee, however, is a function of the number of weeks in which he has worked.[1] The returning veteran does not accumulate credit units for his time in the military since he has not worked for Republic Steel during that time. Petitioner concedes that he has been treated as required under the terms of the Plan. His challenge is limited solely to the enforceability of the Plan according to its terms.

THE PROVISIONS OF THE SUB PLAN ARE NOT IN VIOLATION OF 38 U.S.C. 2021

In interpreting the statutory language describing the rights to which returning veterans are entitled, this Court has focused upon two principles. The Court has made it clear that the returning veteran is entitled to those benefits which by their real nature are perquisites of seniority. The Court has also made it clear that the returning veteran is not entitled to benefits which are tied to a bona fide work requirement and which are in the nature of compensation for services rendered. *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) and *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977).

1. There are certain other situations in which credit units can be earned which are set forth in Section 2 of the Plan (A., 19). Generally these involve hours for which pay is received such as jury duty, vacation, union duties, or time on disability. These exceptions to the normal work requirement are much the same as the exceptions to the normal work requirement contained in the Dravo bargaining agreement which was before the Court in *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

Given those two guiding principles, it is important to analyze the precise nature of the SUB benefit, the precise operation of the SUB Plan, and the purposes behind the operation of the SUB Plan. To begin with, SUB credit units are earned generally only through work. Certainly the bona fide nature of the work requirement is not in question here. The record testimony relative to this issue was not disputed by the petitioner below.

In that testimony, Mr. James Carney, a member of the joint industry benefits committee, explained that SUB credits were earned in situations in which wages or wage substitutes had traditionally been paid in the industry. He also explained that the decision was made to award one-half credit unit for any week in which hours were worked because it had been determined that a formula dependent upon the actual number of hours worked had been tried and found to be unnecessary. He stated that this was true for several reasons.

In the first place, the steel industry involves an around the clock operation and the practical reality is that an employee does not work just a few hours if he works at all. More importantly, however, Mr. Carney explained that the bargaining agreements in the industry require that an employee be paid for 4 hours if he reports at all in a given day and further require that a benefit be paid for any week in which an employee works at all if he works less than 32 hours in that week. Thus, according to Mr. Carney, it had been found through actual experience that employees generally work at least 32 hours if they work at all in a given week. (Tr. 33, 40-44). This undisputed testimony certainly establishes that the award of a credit unit is tied to a bona fide work requirement and is related to areas in which wages have traditionally been paid.

Certain other features respecting the operation of the SUB Plan are important to note. An employee earns one

half credit unit for any week in which he has hours worked. The maximum number of credit units which he can accumulate is 52. He exhausts a credit unit in each week in which he is paid a SUB benefit. Thus the units are earned in the short term through the work requirement and are exhausted in the short term.

Moreover, the amount of the benefit represented by a credit unit is not a factor of seniority. Rather the amount of benefit is determined by the wage of the employee which of course depends on the job classification which he holds, by the number of dependents which he has, by the amount of state unemployment compensation benefit which he receives, and by the amount of money remaining in the Plan. (A., 17-19). Thus a 15 year employee may receive a lower dollar benefit than a 3 year employee. The dollar amount of the benefit is independent of any seniority factor.*

The salient features of the SUB Plan, then, are as follows. The earning of credit units is tied to a bona fide work requirement. Seniority is not a factor. A 15 year employee earns one half credit unit for each week in which he has hours worked; so too does a 3 year employee. A 15 year employee can accumulate no more than 52 total credit units; the same is true with a 3 year employee. The dollar amount of benefit represented by each credit unit will be calculated wholly independent of the number of years of seniority which the employee has.

Given these attributes of the SUB Plan, the law does not require that the Plan be invalidated. In *Foster v. Dravo Corp.*, 420 U.S. 92 (1975), this Court considered a bargaining agreement which conditioned vacation eligibility upon work in 25 weeks during the year. The Court

* The wage rate of the employee is determined by the job classification which he holds. That rate is set for each job classification, irrespective of the seniority of the particular employee who may hold that job classification.

found such work requirement to be bona fide. Certainly the evidence in this matter demonstrates the bona fide nature of the work requirement herein. Moreover, the Court noted in that case that "Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation." *Id.*, at 99.

This Court then expanded upon the appropriate analysis in its decision in *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). The Court there indicated that the insertion of a work requirement could not alter the nature of a benefit if it was in fact a seniority benefit. The Court found that pension eligibility and entitlement was such a seniority benefit given the traditional conception of pension benefits as rewards for length of service. The Court noted that the "most significant factor pointing to this conclusion is the lengthy period required for pension rights to vest in the employee." *Id.*, at 593. The Court further noted that the payment formulas were dependent upon earnings at the time of retirement. *Id.*, at 594.

The SUB Plan at issue in the instant case involves a benefit which is more akin to the vacation pay at issue in *Foster v. Dravo* than to the pension rights at issue in *Alabama Power Co. v. Davis.*[2] Certainly there is no lengthy vesting requirement respecting the SUB Plan at issue here. The amount of the benefit is not dependent upon years of service, nor is it dependent upon earnings at the time of retirement. Indeed it is quite possible that the amount of benefit will be higher for a much less senior employee.

In fact, the relationship of the SUB Plan to seniority is essentially a negative one, both in terms of the likelihood

[2] This has long been recognized within the steel industry. The 1969 Pension Agreement for the steel industry was marked as Joint Exhibit 3 in the trial court. Such agreement provided even then that the returning veteran would receive service credit for his time in the military as it affected his pension rights. This was long before the *Alabama Power* decision of course.

of utilizing the benefit and in terms of the amount of the benefit. Seniority is of course a very relevant factor in determining order of lay-off should any lay-off become necessary. Thus the least senior people are the ones most likely to utilize the benefit.

In addition, the total amount of money contributed to fund the Plan is a finite sum. The amount of any benefit paid under the Plan is, *inter alia*, dependent upon the amount of money remaining in the Plan. Thus, as a lay-off becomes more extensive and impacts on more senior employees, the amount of money in the Plan becomes less due to previous payments made to less senior people. As a result, the amount of the benefit may be smaller when it is utilized by more senior employees. This is hardly indicative of a benefit which should be labeled as a perquisite of seniority.

It is apparent when both the purpose and actual operation of the SUB Plan are analyzed that the Plan is not violative of 38 U.S.C. 2021. The SUB Plan provides a short term benefit which is earned in the short term and exhausted in the short term. The accrual of credit units is conditioned upon a bona fide work requirement, the nature of which is undisputed in the record. The amount of the benefit and the total number of credit units available are not dependent upon seniority. The purpose of the benefit is to assist in providing a wage substitute in periods when work is unavailable. Nothing in the statute, or in the case law interpreting the statute, requires that the Plan be implemented in any fashion other than in the express fashion which was agreed to as a result of the collective bargaining process.

THE ARGUMENTS ADVANCED BY PETITIONER DO NOT REQUIRE A DIFFERENT RESULT

In arguing that the Plan is not in accord with the law, petitioner relies upon the decision of the Court of Appeals for the Third Circuit in *Hoffman v. Bethlehem Steel Corp.*,

477 F.2d 860 (3rd Cir. 1973). It is true that such case does involve the SUB Plan in the steel industry and that it reaches a result which is not in accord with the result reached by the lower courts in the instant case. It is also true, however, that the decision in that case was rendered prior to the decisions of this Court in either *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) or *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977).

When the decision of the Third Circuit is analyzed, it is apparent that the principal focus of the court was on the "bizarre result" analysis mentioned by this Court in its decision in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966). The significance of that test, however, was explicated by this Court in its decision in *Foster v. Dravo Corp., supra*. This Court therein indicated that the theoretical possibility that vacation entitlement could be achieved by working one hour per week in 25 separate weeks did not render an otherwise bona fide work requirement invalid.

The Third Circuit did not have the benefit of this Court's analysis in *Foster v. Dravo Corp.*,[3] *supra*, when it decided *Hoffman, supra*. Thus when the Third Circuit decided *Hoffman v. Bethlehem Steel, supra*, it applied a test which is not the appropriate test to be applied.

Moreover, the evidence in this case makes it very clear that the bizarre result analysis was not only conceptually inappropriate but factually incorrect. The testimony of Mr. Carney below as to the practical realities of actual work practices within the industry was undisputed. He pointed out that in fact the work formula was adopted after prior use of a formula which correlated more precisely to the number of hours worked. That formula was abandoned because it was found to be unnecessary. It was

3. It is true that *Foster v. Dravo Corp.* came to this Court from the Third Circuit but this Court's opinion was not rendered until 1975.

found to be unnecessary because the contractual requirements in the steel industry are such that an employee normally works at least 32 hours in any week in which the employee works at all. This evidence is undisputed in this case. Thus the analysis made by the Third Circuit in its decision in *Hoffman v. Bethlehem Steel, supra,* is faulty and it was the lower courts in the instant case which reached the proper decision.

Petitioner relies on one other appellate decision respecting a SUB Plan, i.e., *Akers v. General Motors Corp.*, 501 F.2d 1042 (7th Cir. 1974). That decision does not involve the Plan in the steel industry. Moreover, the court there found that the Plan it was examining did not condition the accrual of SUB credits on actual work. *Id.*, at 1045. That decision is thus not relevant in the instant case.

Petitioner argues that SUB payments are really analagous to severance payments. But that is not the case. Generally, severance payments are directly related to years of service, both as respects eligibility and as respects the amount of the benefit. Certainly that was key to the decision of this Court in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966). As shown above, that is manifestly not the case with the SUB Plan at issue here. Moreover, severance payments generally are thought to be a final payment for a permanent cessation of employment and thus are somewhat akin to a reward for total service. Conversely, SUB payments are generally temporary in nature, designed to cushion against temporary dislocations which generally impact on employees with lesser seniority.

Petitioner argues that the two year eligibility requirement for SUB payments is indicative of a seniority benefit. But two things must be remembered. The two year eligibility requirement is for payment of benefits. Accrual of credit units begins immediately in the first week in which an employee works. The two year period respects only the payment of benefits. Thus no time actually worked is irrelevant as respects the earning of credit units.

Moreover, it should also be remembered that the returning veteran is credited with the time spent in the military service for purposes of calculating his continuous service. Thus, for purposes of payment eligibility, time in the military is counted. It is only the accrual of credit units which does not occur unless actual work takes place.

It is apparent that resolution of this case is dependent upon an analysis of the SUB Plan here at issue, an understanding of the purpose and operation of that Plan, and an application of the principles articulated most recently by this Court in the cases of *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) and *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). Despite this, the Court may be interested in the analysis of certain other lower courts.

For example, in *Gentile v. U.S. Trucking Corporation,* 355 F. Supp. 960 (S.D.N.Y. 1973), *aff'd,* 489 F.2d 752 (2d Cir. 1974), the courts considered the rights of a returning reservist to certain welfare and insurance benefits. The courts found that the benefits were conditioned upon bona fide work requirements and noted that the amount of benefit payable for each credit earned was the same for all employees, whatever their seniority.

In *Kasmeier v. Chicago, Rock Island and Pacific R. Co.*, 437 F.2d 151 (10th Cir. 1971), the court considered a case involving vacation benefits. The court analyzed the issues in a fashion consistent with the subsequent decision of this Court in *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). The court noted that the applicable statute did not require discrimination in benefits which granted preference to returning veterans. See also *Bradley v. General Motors Corporation,* 283 F. Supp. 481 (E.D. Mo. 1968).

Finally, in analyzing the issues in the instant case, it is important to keep in mind what the statute in question is seeking to accomplish. In general terms, it seeks to protect the veteran as respects those things which he can never recover if he loses them as a result of his military service.

Thus, e.g., if the veteran loses 2 or 3 years from his pension credit, he can never recover those years.

On the other hand, the veteran does not lose such things as sick pay, medical insurance, and vacation entitlement. During his time in the military, he has such benefits provided to him while in that employment. When he returns to civilian employment he has such benefits there too.

The situation as respects SUB payments is much more akin to the latter type benefits than to pension benefits. One uncertainty which the veteran does not face during his years in the military is the threat of lay-off. When he returns to civilian employment, he immediately again begins to accrue SUB credit units to be utilized should he ever need them. It is not necessary to require that he accumulate other credit units which he can hold in the bank during a period of time in which he is free from the threat of lay-off.

CONCLUSION

The trial court below wrote two very detailed opinions as to why the SUB Plan at issue here was fully in accord with the law. The court correctly analyzed the issues under the controlling precedents of this Court and based upon the undisputed evidentiary facts in the record. The decision of the trial court was quite properly affirmed by the Court of Appeals below. Respondent asks that the decisions of the lower courts be affirmed.

Respectfully submitted,

VICTOR E. DEMARCO
MICHAEL A. NIMS

Jones, Day, Reavis & Pogue
1700 Union Commerce Building
Cleveland, Ohio 44114
(216) 696-3939

Attorneys for Respondent